BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-128

RBOC PAYPHONE COALITION'S REPLY COMMENTS IN SUPPORT OF PETITION FOR RECONSIDERATION AND CLARIFICATION

After years of litigation, the Commission has made the wrong choice, but it has a final chance to correct its error. When a payphone call is completed by a reseller, there is only one entity that is capable of ensuring that the payphone provider that originated the call is fairly compensated and that the long distance carriers that benefit from the call pay compensation in a fair and efficient manner. That entity is the IXC which accepts the call from the payphone. The IXC can accept the call originated from the payphone (or block it), pass it to the reseller (or block it), and enter into contractual arrangements to ensure that the reseller fully compensates the IXC for the services that the IXC provides. Although AT&T, MCI, and Sprint oppose retaining the IXC-pays rule that is *still* in place and still functioning relatively well, their arguments simply confirm that the Commission has adopted a rule that is based on legal error and that will unquestionably prove both costly and ineffective.

At a minimum, if the Commission maintains some version of its reseller-pays rule, it should grant the RBOC Payphone Coalition's alternative petition for clarification. The Commission should clarify that, if a switch-based reseller ("SBR") fails to comply with its certification and audit requirements, that the IXC that handed the call to the SBR remains responsible for paying compensation, with the IXCs able to recover the costs associated with

payment of such compensation from its SBR customers through unregulated market arrangements. Although the IXCs purport to oppose this clarification, in fact they ask that they be permitted to pay compensation on behalf of their SBR customers without PSPs' permission (albeit as "conduits" for their SBR customers). The relief they seek is thus one example of an arrangement that would be permitted under the clarification that PSPs have requested. IXCs' request that they be allowed to reap a profit by charging their SBR customers administrative fees, yet bear no regulatory responsibility to compensate PSPs, should be rejected. Where SBRs fail to comply with audit and certification requirements, they stand in a position no different from any other IXC customer. IXCs must track and pay compensation for compensable calls to all such customers, with the terms of IXCs' recovery of such costs established by contract. That result is one that all IXCs should support.

I. THE COMMISSION SHOULD GRANT THE COALITION'S REQUEST FOR RECONSIDERATION

The Coalition's request for reconsideration is based on three broad points. First, the reseller-pays system that the Commission adopted is massively inefficient and re-regulatory, yet, despite its enormous costs, the system is functionally the same as a system that has already proven ineffective. Second, the Commission's justifications for adopting the rule were legally wrong and contrary to the record evidence. Third, the IXC-pays rule has proven far more effective and administrable than the SBR-pays regime that the Commission once condemned and has now readopted, and the IXCs' only objection to the rule is one that the Commission can easily meet. The IXCs cannot refute any of these points.

The New Rule Is Massively Inefficient: Far from disputing that the reseller-pays rule is inefficient and unworkable, the IXCs confirm the diagnosis. For example, MCI squarely acknowledges that SBRs have not "invested in payphone compensation tracking systems or

[have] systems of questionable accuracy and robustness." MCI Comments at 5. And it acknowledges that imposing tracking and compensation obligations on carriers unable to fulfill them "would create a regulatory nightmare involving excessive network upgrades and transaction costs." *Id.* at 2 (internal quotation marks omitted). Moreover, MCI admits that the Commission can anticipate massive noncompliance with the requirements that it has imposed; it predicts that nearly two-thirds of its SBR customers will violate the law. *See* MCI Comments at 10-11. Likewise, Sprint blasts the new rules as "very expensive and hugely inefficient" and admits that the new rules will not ensure that PSPs receive the fair compensation for each and every completed call that section 276 requires. Sprint Comments at 9. With friends like these, the reseller-pays rule hardly needs enemies.

The IXCs pay lip-service to the enforcement mechanisms adopted in the Commission's rules (*see, e.g.*, AT&T Comments at 8-9), but there is no serious dispute that such mechanisms will be entirely ineffective with regard to the vast majority of SBRs. For many SBRs, perhaps a majority, their compensation obligations will be small relative to the cost of pursuing enforcement, and they are likely to ignore their obligations with a feeling of impunity. Even if they are pursued, they are more likely to fold up shop than to make good on unpaid compensation obligations. Accordingly, the Commission has adopted legal requirements that all parties agree will be ignored by the vast majority of entities that are subject to them. Such a regime cannot withstand review.

The Commission's Legal Reasoning Was Wrong: The IXCs cannot buttress the Commission's faulty conclusion that the reseller-pays rule is legally compelled. As an initial matter, the Commission's statement that, under the IXC-pays rule, IXCs act as "collection agents" for PSPs is indefensible. While AT&T and Sprint invoke the holding in *Illinois Public*

Telecommunications Association v. FCC, 117 F.3d 555, 565 (D.C. Cir. 1997), that one carrier cannot bear the obligations of another carrier on grounds of administrative convenience (*see* AT&T Comments at 10-11; Sprint Comments at 8-9), that principle is inapplicable here. Under the IXC-pays rule, IXCs pay *their own* obligations, not those of any other carrier. Coalition Pet. at 11. Even MCI acknowledges this: it admits that the prior regime established that IXCs were themselves "responsible for all payphone compensation." MCI Comments at 14. Notably, MCI's *sole* objection to the IXC-pays regime is that the Commission supposedly "limit[ed] the contractual means by which [IXCs] might recover compensation costs *associated with* payphone calls passed *to their SBR customers*." *Id.* (emphasis added). But MCI can therefore have *no* objection to the Coalition's petition for reconsideration, which makes clear that IXCs' means of recovering compensation costs should be left to the unregulated market.

Nor can the IXCs defend the Commission's conclusion that SBRs should pay compensation directly to PSPs because they are the supposed "primary economic beneficiary" of the calls they complete. The Commission has never allocated per-call compensation responsibilities *among long-distance carriers* based on the conclusion that one of the carriers involved in carrying and billing for the call was the "primary economic beneficiary." To the contrary, as MCI acknowledges, the Commission allocated tracking and payment responsibility to facilities-based carriers and not to pure resellers because a different allocation would be administratively unworkable. MCI Comments at 2.[1] Even assuming that SBRs can be

[1] The Commission did not, as MCI insinuates, adopt any such allocation in establishing per-*payphone* compensation obligations for independent payphone providers prior to the adoption of the 1996 Act. *Cf.* MCI Comments at 1 & n.3 (citing Second Report and Order, *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, 7 FCC Rcd 3251 (1992)). The Commission there allocated compensation obligations exclusively among IXCs with more than $100 million in toll revenues based on their total toll revenues. That allocation had nothing to do with the allocation of per-*call* compensation that is at issue here and did not

reasonably characterized as *the* "primary" economic beneficiary of calls they complete, rather than one of the primary economic beneficiaries of such calls, along with IXCs, that conclusion provides no basis for adopting an admittedly inefficient and unenforceable regime.

Finally, none of the parties defend the Commission's statement that PSPs may have been "overcompensated" under the IXC-pays regime. IXCs do not dispute that, as a legal matter, PSPs are not overcompensated when IXCs choose to pay on all calls completed to a reseller's platform, even if the call is not ultimately completed to an end-user. *See* Coalition Pet. at 14. To the contrary, the IXCs seek the Commission's endorsement for that very result in AT&T's Petition for Reconsideration. And, as a factual matter, the record contains no evidence that PSPs have ever been overcompensated; to the contrary, the record establishes beyond dispute that PSPs have been undercompensated, in part because the per-call compensation rate does not include any element for bad debt. *Cf.* Sprint Comments at 13 ("[c]ollection and bad debt . . . are among the ordinary costs" of providing payphone service).

In sum, the Commission adopted a rule that it knew would be inefficient and unenforceable based on a mistaken belief that this result was legally required. The Commission was wrong, and it should correct its mistake.

IXC-Pays Is Efficient: There is no room for dispute that an IXC-pays regime – with appropriate clarification that IXCs are free to seek reimbursement of payphone compensation costs from their customers pursuant to unregulated "contractual means" (MCI Comments at 14) – is far more efficient than the SBR-pays rule that the Commission readopted in the *Reseller Order*. Only MCI attempts to argue that the SBR-pays rule tracks "marketplace practice"

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implicate the question of allocation of responsibility between IXCs and SBRs. To the contrary, the Commission's methodology in that order excluded almost all SBRs from responsibility for payment, and allocated compensation responsibility based on all toll revenues, including revenues from SBRs.

because, it claims, "the party offering . . . service to end-users is responsible for compensating its input suppliers." MCI Comments at 1. But the input that IXCs supply to their SBR customers is a PSP-originated call; thus, the input *already* includes payphone service. According to ordinary marketplace practice, IXCs should charge and SBRs should pay for the input that the IXCs actually deliver to the SBRs, that is, the payphone-generated call, not just the IXCs carriage. If MCI were right, a car dealership would not purchase cars from a car manufacturer, but would instead compensate the manufacturer for assembly, the manufacturer's suppliers for parts, and the shipping company for transportation. That is not how markets work, yet the Commission – disregarding both efficiency and regulatory rationality – has imposed the equivalent system here.

II. THE COMMISSION SHOULD GRANT CLARIFICATION THAT IXCS ARE RESPONSIBLE FOR COMPENSATION ON COMPLETED CALLS WHERE NO OTHER CERTIFIED COMPLETING CARRIER IS IN THE CALL PATH

The Coalition has asked for clarification that, in the event an SBR chooses not to comply with the audit and certification requirements, that an SBR cannot be considered a "Completing Carrier" within the meaning of the Commission's rules. Moreover, an IXC is relieved of responsibility for tracking and paying compensation only for calls transmitted to Completing Carriers – not for calls transmitted to non-certifying SBRs. The APCC asks for comparable relief.

The IXCs ostensibly oppose the proposed clarification, but all parties concede that the majority of SBRs will be unable or unwilling to comply with the certification requirements in the Commission's rules. Under the IXCs' reading, all of those SBRs will be committing felonies. By contrast, under the more reasonable reading of the rules, SBRs that fail to comply with audit and certification requirements will not be violating the law; they simply will not qualify as "Completing Carriers" under the Commission's rules. As to those calls, accordingly, the IXC,

not the SBR, is the "Completing Carrier" responsible for tracking and paying compensation. The IXC will in turn recover payphone compensation costs from the customers to which the payphone-originated calls are routed.

No party disputes that the requested clarification would be consistent with the order's underlying rationale. As the IXCs must concede, the Commission shifted tracking and payment responsibility to SBRs because SBRs can develop the ability to track payphone-originated calls to completion. But, to the extent that SBRs do not, in fact, have the ability to track and pay compensation – and it must be presumed that non-certifying carriers have no such ability – IXCs are in a better position to track and pay compensation, because IXCs are in a position at least to determine which calls are payphone-originated. Non-certifying carriers likely lack even that capability.

Nor does any party argue that it would be unfair to leave IXCs' recovery of payphone compensation paid on account of calls routed to non-certifying SBR customers to market mechanisms. To the contrary, SBRs will only forgo compliance with audit and certification requirements to the extent that a better market alternative is available from their IXC suppliers. And IXCs will be free to develop commercial offerings that will cater to the needs of various classes of SBRs. *See* Coalition Pet. at 17-18. Accordingly, by granting the Coalition's requested clarification, the Commission can retain at least some of the benefits of the IXC-pays rule, while giving qualified SBRs the legal right to handle their own payment obligations.

It is critical for the Commission to understand that – in spite of their rhetoric – the IXCs actually *endorse* a modified form of the relief that the Coalition requests. Thus, AT&T – with the endorsement of MCI and Sprint – asks the Commission to make clear that, in circumstances where an IXC enters into an agreement with an SBR to pay compensation on 100% of call

attempts routed to the SBR, that PSPs' consent to such an arrangement should not be required. *See* Sprint Comments at 23 ("Like AT&T, Sprint intends to offer SBRs a market-priced service" whereby Sprint will make "payments to PSPs based on Sprint's network answer supervision."). This is simply one example of the type of arrangement that would be permitted under the Coalition's clarification; accordingly, the Coalition's clarification would permit IXCs to enter into exactly the type of business arrangement they say they – and the vast majority of their SBR customers – want.

The IXCs' proposal does differ from the Coalition's requested relief in a significant respect, however. In the IXCs' view, even in cases where an IXC has agreed with an uncertified SBR to pay compensation to PSPs on the SBR's behalf, and where IXCs are charging their SBR customers for performing tracking and payment functions, IXCs should have no *regulatory* obligation actually to pay any compensation to PSPs. Instead, they argue that the regulatory obligation to pay compensation should remain on the SBRs, with the IXCs as a mere "conduit." IXCs thus ask the Commission to hold that they should be permitted to collect compensation from SBR customers on account of payphone-originated calls – whether or not PSPs have agreed to this arrangement – yet the IXCs should be under no regulatory obligation to pay the money they collect from the SBRs to PSPs. That result would be unlawful: to the extent that the Commission adopts regulations authorizing IXCs to collect per-call compensation payments from their customers on account of payphone-originated calls that the IXCs route to those customers, IXCs must be under a *regulatory* obligation to pay compensation to the PSP.[2]

[2] As a practical matter, it is hard to believe that the IXCs are serious about their "conduit" proposal because it would create a logistical nightmare and lead to absurd results. IXCs could not report calls routed to SBRs on which the IXC was paying compensation as completed calls under section 64.1310(a). Instead, under section 64.1310(c), IXCs would have to report separately all calls routed to SBRs, whether or not the SBRs were actually paying compensation.

Indeed, the claim that IXCs are merely acting as conduits for SBRs blinks reality. To the contrary, where SBRs choose not to qualify as "Completing Carriers" and instead leave compensation responsibility on the IXC, SBRs are *not* fulfilling their tracking and compensation obligations: the SBR is *not* compensating PSPs; it is (presumably) *not* tracking call completions; and it is (presumably) *not* complying with its audit and certification requirements. If the Commission approves such arrangements as a *regulatory* matter, relieving IXCs and SBRs of the need to secure PSPs' consent to the alternative arrangement, the Commission must ensure that PSPs have a *regulatory* remedy against the party that in fact has assumed responsibility for tracking and paying compensation – the IXC.

The only argument that the IXCs offer against the Coalition's proposal is that it would supposedly create an incentive for SBRs not to develop independent tracking capability. *See* AT&T Comments at 12-13; MCI Comments at 16-17; Sprint Comments at 11. This is plainly wrong. To the contrary, as the Coalition has already explained (and as MCI at least acknowledges (*see* MCI Comments at 10-11)), SBRs who believe they can efficiently track and pay compensation will choose not to pay IXCs for performing that service; SBRs that cannot efficiently develop such capability will prefer to pay IXCs to do it for them. Because, under the Coalition's proposal, the IXCs are free to establish "market-priced service[s]" (Sprint Comments at 23) for SBRs that have no ability to track and pay compensation, this rule would not provide any greater disincentive to SBRs' deployment of tracking capability than would the IXCs' plan.

Moreover, under section 64.1310(d), IXCs would still be required to provide telephone numbers and other information for all SBRs, even for SBRs that would not be paying any compensation and even though the IXC would otherwise be tracking the call like any other call routed to an end-user. Moreover, SBRs would remain subject to liability for failure to comply with their tracking and payment obligations.

CONCLUSION

The Commission should grant the Coalition's petition.

Respectfully submitted,

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